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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND FREEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0704-PC-185
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0106-CF-4569

October 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Raymond Freeman appeals the denial of his petition for post-conviction relief. He presents the following restated and consolidated issue for review: Is Freeman's claim that he was improperly tried *in absentia* barred by the doctrine of *res judicata*?

We affirm.

Freeman was convicted of forgery, a class C felony, and false informing, a class B misdemeanor, following a jury trial at which he did not appear. He was also found to be a habitual offender. On direct appeal, Freeman raised two issues, including whether the trial court properly tried him *in absentia*. *See Freeman v. State*, Cause No. 64A03-0308-CR-314 (April 29, 2004).

The following facts, which are relevant to this appeal, were set out in our prior memorandum decision:

> Trial was set to begin with jury selection on October 22, 2001 and presentation of evidence on October 24, 2001. At a status hearing on October 2, 2001, at which Freeman appeared in person and with his counsel, the trial court reiterated the trial dates and times. However, on October 22, 2001, the day set for jury selection, Freeman did not appear. The trial court offered his counsel the option of proceeding with the trial in Freeman's absence or to issue a warrant on the failure to appear and postpone the trial. Counsel elected to proceed. At some point during jury selection, Freeman apparently appeared in the courtroom, but did not make his presence known to the court or his counsel until the proceedings were over for the day. He did at that time speak with his counsel, who explained the choice he had made in proceeding with the trial and again advised Freeman of the trial date. However, on October 24, 2001, the date set for the presentation of evidence to begin, Freeman was again absent from court. The trial proceeded in his absence. Before the proceedings began on the second day, Freeman's counsel advised that he had been informed by his office that they had received a call saying Freeman had been taken to the hospital in Chicago the night before his trial was to begin and was having surgery. The trial court noted that there was no verification or explanation and that neither the court nor counsel had received a communication from Freeman or his family and continued with the trial.

> During jury deliberations that day, Freeman's counsel filed a motion for mistrial. Apparently, his secretary had been given a number which, when she dialed it, was answered "VA Hospital" and she was then transferred to Freeman who sounded medicated. The motion was denied, and the jury returned its verdict, finding Freeman guilty of forgery and false informing. Following the enhancement phase, the jury also found Freeman to be an habitual offender. A warrant was then issued for Freeman's arrest.
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> Freeman was apparently arrested sometime in March 2003 on the bench warrant. At Freeman's sentencing hearing, Freeman offered only a pathology report evaluating Freeman's gallbladder and his own statement that he was in surgery in support of his contention that he was hospitalized for emergency surgery during the trial. The trial court sentenced Freeman to six years for the forgery count, to be served concurrent to 180 days for the false reporting count, enhanced by eight years for the habitual offender finding. He was thus sentenced to an aggregate of fourteen years….

Slip op. at 3-5 (footnote and citations to record omitted).

In challenging his trial *in absentia* on direct appeal, Freeman argued that the trial court erred in denying his motion for mistrial because he had demonstrated that a medical emergency kept him from appearing at trial. We disagreed, explaining:

> The record shows that neither Freeman nor anyone on his behalf contacted the court on the second day of trial regarding his absence or the reason therefor, although someone did contact his attorney's office that day with a number which allegedly connected to a hospital. In the approximately eighteen months between trial and sentencing, Freeman never contacted the court to explain his absence, ascertain what had happened in his absence, or seek relief from the outcome of the proceedings. At his sentencing hearing, all Freeman offered to prove his "medical emergency" was a pathology report showing that a laboratory specimen collected from Freeman had been examined on the date in question. He did not offer an emergency room report, a surgical report, or hospital bills showing services provided. He clearly had time to obtain those records if they existed. Where Freeman clearly knew of the trial date and failed to substantiate his claim that an emergency kept him from appearing, the trial court did not err in denying his motion for mistrial and proceeding with the trial in his absence.

Id. at 6-7. Thus, on April 29, 2004, Freeman's convictions and his adjudication as a habitual offender were affirmed on direct appeal.

Thereafter, on December 22, 2004, Freeman filed a *pro se* petition for post-conviction relief (PCR petition), in which he challenged, *inter alia*, his trial *in absentia*. The State responded that this issue was raised in Freeman's direct appeal and decided adversely to him. Thus, the State argued the claim was barred by *res judicata*.

An evidentiary hearing was held on September 1, 2006, at which Freeman submitted copies of medical records from the VA Chicago Health Care System to the court. The first set of medical records was mailed to Freeman at the Porter County Jail on July 28, 2003, less than two weeks after the sentencing hearing and well before he filed his direct appeal. The records indicate that a Raymond Freeman, SSN 335-42-1716, DOB 5/12/48 was admitted to the hospital on the evening of October 23, 2001, underwent a laparoscopic cholecystectomy (gallbladder surgery) on October 25, and was discharged to home on October 26. A second set of medical records was mailed to Freeman at the Lakeside Correctional Facility on October 4, 2004, with information similar to that of the first set of records.

In addition to the medical documents, Freeman presented the testimony of his trial attorney, David Brooks, as well as his own testimony. Brooks testified, in part, that Freeman provided him with the one-page pathology report that was submitted to the trial court at the sentencing hearing. Brooks had explained to Freeman, in a letter dated December 5, 2001, that he needed more complete medical records to support a motion for mistrial. While Freeman subsequently signed medical releases, Brooks testified that the forms were in no condition to be submitted to the hospital because they were torn and "a disaster." *Transcript* at 16. Freeman provided Brooks with no other medical records.

Freeman testified at the PCR hearing that he believed the one-page pathology report would be sufficient evidence of his emergency hospitalization. When this evidence proved insufficient at the sentencing hearing, Freeman claimed he obtained further medical records on July 28, 2003 (less than two weeks after he was sentenced) and gave them to a guard at the Porter County Jail to deliver to the trial court. Freeman, however, did not provide these records to his trial or appellate counsel, and they were apparently never entered into the trial court's record. After his direct appeal proved unsuccessful, Freeman obtained the medical records once again in October 2004, before filing the instant PCR petition.

At the conclusion of the PCR hearing, Freeman's counsel acknowledged the doctrine of *res judicata* but argued this case involved "in a way newly discovered evidence." *Id.* at 58. Counsel further argued that had these medical records been before the trial court, the court would have found that Freeman's absence from trial was not voluntary. Counsel claimed this was a case of fundamental error.

On December 28, 2006, the post-conviction court entered a detailed order denying Freeman's PCR petition. The court concluded in part as follows:

> Freeman failed to present sufficient evidence of his hospitalization at the trial, between the trial and his arrest, between his arrest and the sentencing hearing, at the sentencing hearing, or following his sentencing hearing until the PCR hearing nearly 5 years later. Freeman failed to present any evidence of his hospitalization to the Court of Appeals even though he had apparently obtained copies of the records some months before filing his appeal. Freeman has failed to show any reason why the records were unascertainable at the time of trial and direct appeal. Therefore, this case does not present an issue of newly discoverable or attainable evidence such that Freeman would be eligible for the Court to rehear the issue following the Court of Appeals decision on the merits.

> Therefore the Court finds that the issue is governed by *res judicata* and that Freeman has waived his right to raise the issue in these PCR proceedings.

Appellant's Appendix at 46.[1] Freeman now appeals.

On appeal, Freeman argues the medical records admitted at the PCR hearing establish that he was hospitalized on an emergency basis at the time of his trial and that his absence from trial was not voluntary. Thus, he claims his trial *in absentia* constituted fundamental error and "the bar of *res judicata* should give way in this case because it works a manifest injustice." *Appellant's Brief* at 7.

Post-conviction proceedings do not afford an opportunity for a super appeal, which would allow the rehashing of prior proceedings regardless of the circumstances surrounding them. *Benson v. State*, 780 N.E.2d 413 (Ind. Ct. App. 2002), *trans. denied*. Rather, the purpose of a petition for post-conviction relief is to raise issues that were unknown or unavailable to the petitioner at the time of the original trial and appeal. *Id*.; *Holt v. State*, 656 N.E.2d 495 (Ind. Ct. App. 1995) (absent a showing that issues were unascertainable at the time of trial and direct appeal, allegations of error arising therefrom may not be raised in a post-conviction proceeding and are waived), *trans. denied*. "When the petitioner has already been afforded the benefit of a direct appeal, post-conviction

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[1] Additionally, the court found Freeman was not credible and expressed "lingering doubts as to the validity of the identity on the medical records, particularly in light of the petitioner's apparent skill in obtaining and utilizing the altered identifying documents of others". *Id*. at 47. Thus, even considering the medical records submitted at the PCR hearing, the court concluded Freeman had presented insufficient evidence to establish the legitimacy of his hospitalization. We need not address the trial court's determination in this regard, however, because we agree with the trial court that Freeman's claim is barred by the doctrine of *res judicata*.

relief contemplates a rather small window for further review." *Benson v. State*, 780 N.E.2d at 418.

It is well established that if an issue was raised and determined on direct appeal, it is *res judicata* and not subject to consideration for post-conviction relief. *See, e.g.*, *Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007); *Holt v. State*, 656 N.E.2d 495. "The doctrine of *res judicata* prevents the repetitious litigation of that which is essentially the same dispute." *Ben-Yisrayl v. State*, 738 N.E.2d 253, 258 (Ind. 2000). While our Supreme Court has indicated that a court always has the power to revisit its own prior decisions, it has also warned "courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice." *State v. Huffman*, 643 N.E.2d 899, 901 (Ind. 1994) (internal quotations omitted).

Contrary to Freeman's assertion on appeal, this is not one of those rare cases involving extraordinary circumstances or manifest injustice. The medical documents admitted at the PCR hearing were unquestionably available at the time of sentencing. In fact, Freeman had well over a year after his conviction (while he was a fugitive, intentionally avoiding the warrant for his arrest) to obtain the medical records and prove his alleged involuntary absence from trial. After his arrest, Freeman had another four months to obtain the records. Moreover, while Freeman apparently obtained these documents with little effort shortly after his sentencing hearing and before the initiation of his direct appeal, he did not submit them to his trial or appellate counsel so that they could be properly submitted to the trial court. Rather, he waited nearly five years after

his conviction and three years after he had actual physical possession of the medical records to offer them into evidence at his PCR hearing as purported evidence of his emergency hospitalization. This was too late. Freeman's renewed challenge to his trial *in absentia* is barred by the doctrine of *res judicata*. *See Maxey v. State*, 596 N.E.2d 908, 911 (Ind. Ct. App. 1992) ("[i]t is imperative to an orderly judicial system that, at some point, controversies end").

Judgment affirmed.

SHARPNACK, J., and CRONE, J., concur.